NO. 46912-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES CLOUD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 14-1-02535-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant is unable to show the prosecutorial misconduct occurred, let alone that he was prejudiced by it such that no curative instruction would have neutralized any error?

2. Whether defendant has failed to show the admission of prior bad acts materially affected the outcome of his trial as many were properly admitted and any error in any of the admissions were harmless?

3. Whether the trial court properly calculated defendant's offender score?

4. Whether defendant has failed to meet his burden of showing defense counsel's performance was deficient and that defendant was prejudiced by any deficiency?

5. Whether defendant has failed to show that the "reasonable doubt" instruction given to the jury improperly shifted the burden of proof?

B. STATEMENT OF THE CASE.

1. Procedure

On July 1, 2014, the Pierce County Prosecutor's Office charged JAMES SCOTT CLOUD, hereinafter "defendant", with two counts of felony harassment. CP 1-2. The case proceeded to trial on October 6,

2014 before the Honorable Jack Nevin. RP (10/6/14) 3. A CrR 3.5 hearing was held where the court ruled defendant's statements were admissible and later entered findings of fact and conclusions of law to that effect. RP (10/6/14) 3-31; CP 157-162.

After hearing all the evidence, the jury found defendant guilty as charged. RP (10/10/14) 2; CP 133-134. The court sentenced defendant to 38 months confinement. RP (11/18/14) 8; CP 144-158. Defendant filed a timely notice of appeal. CP 135.

2. Facts

In May and June of 2014, defendant was an inmate at the Pierce County Jail. RP (10/7/14) 85-86, 121-123. Unit 3 South contains Level 1 offenders who pose the highest security risk and defendant was housed there because of his behavior. RP (10/7/14) 77-78; RP (10/8/14) 51-52, 61. During that time period, Corrections Officer Cody Olson met defendant in the medical clinic when defendant attempted to "stare down" Officer Olson. RP (10/7/14) 86-87. Officer Olson believed defendant's actions were a passive aggressive threat and from then on, every time the defendant saw Officer Olson, the defendant would taunt him or say things to him. RP (10/7/14) 86-87, 93. Officer Olson alerted his supervisor and defendant received infractions for his behavior. RP (10/7/14) 95-97, 100-01.

Despite being punished, defendant's behavior towards Officer Olson only got worse. RP (10/7/14) 101. During one incident, Officer Olson dropped off defendant's meal tray and the defendant called him several derogatory names. RP (10/7/14) 87-88. When he went to pick up the defendant's meal tray, the defendant grabbed ahold of Officer Olson's hand and Officer Olson had to use pepper spray to get defendant to release his hand. RP (10/7/14) 86-88. The use of pepper spray is considered a use of force so Officer Olson had to write an incident report. RP (10/7/14) 89. Officer Olson testified that while derogatory name calling is grounds for discipline, grabbing a corrections officer is "off the charts" behavior. RP (10/7/14) 88.

On June 5, 2014, defendant stood at the door to his cell in a fighting stance and told Officer Olson numerous times "I'm going to fuck you up. Make sure you put it in your report that I promise to fuck you up." RP (10/7/14) 90-92. Officer Olson believed the statements were a threat and feared for his family's safety as well as his own because of his previous interactions with defendant who was scheduled to be released soon. RP (10/7/14) 92.

In May of 2014, Azusa Matsubayashi was also working at the Pierce County Jail as a mental health professional and evaluated the defendant for mental health issues. RP (10/7/14) 113-14, 121, 125; RP (10/8/14) 17-18. While she only evaluated defendant that one time, part of her duties included checking on the inmates in 3 South where the

defendant was located every other day and as needed. RP (10/7/14) 118-120. While doing this, defendant began making derogatory comments towards her. RP (10/7/14) 124-26. Then on June 30th, when Ms. Matsubayashi was near the defendant's cell, she heard him say something like he was going to kill her. RP (10/7/14) 122; RP (10/8/14) 17-19. After pausing for a second to see if defendant said anything else, Ms. Matsubayashi heard defendant say he was going to kill her and for her to tell the sergeant and lieutenant because it was not a threat, it was a promise. RP (10/7/14) 122-23; RP (10/8/14) 17-19. Ms. Matsubayashi wrote down what defendant said and reported it to her supervisor after she finished checking on the other inmates. RP (10/7/14) 123.

Ms. Matsubayashi also told Sergeant Steven Briener that she had been threatened by the defendant. RP (10/8/14) 45-48. When Sergeant Briener told defendant he needed to stop making threats to the staff, defendant said that he did not care and he would continue to threaten the staff. RP (10/8/14) 48. Ms. Matsubayashi testified that other individuals have made rude comments to her, but it usually happens when individuals are off their medication or psychotic. RP (10/7/14) 128-30. She said that defendant's behavior concerned her because she believed he was capable of following through with the threat, understood the consequence and did not seem to have any concern for the ramifications of making the threats. RP (10/7/14) 128-31.

Defendant chose to testify during the trial. RP (10/8/14) 65. He denied threatening Officer Olson on June 5th and said someone else did, but he did not know who it was. RP (10/8/14) 68, 85. Defendant said that he never grabbed Officer Olson's hand and Officer Olson sprayed him with pepper spray for no reason. RP (10/8/14) 85. He also denied threatening Ms. Matsubayashi on June 30th, and again said he believed it was someone else. RP (10/8/14) 69, 86.

C. ARGUMENT.

1. DEFENDANT IS UNABLE TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT IN ANY OF THE CLAIMED INSTANCES, LET ALONE THAT HE WAS PREJUDICED BY THEM SUCH THAT NO CURATIVE INSTRUCTION COULD HAVE NEUTRALIZED ANY ERROR.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and that the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a

substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

a. While the prosecutor's question about whether Officer Olson completely imagined the defendant's actions could be considered improper, defendant is unable to show he was prejudiced.

It is misconduct for a prosecutor to ask a witness to express an opinion about whether or not another witness is lying or mistaken because it places irrelevant information before the jury and potentially prejudices the defendant. ***State v. Wright***, 76 Wn. App. 811, 821-22, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010 (1995). However, questions about whether another witness is "mistaken" or "got it wrong" may be relevant if there are discrepancies in the testimony. *Id.* at 822.

During cross examination of the defendant in the present case, the prosecutor asked defendant what happened during the "stare down" incident with Officer Olson. Defendant denied looking strangely at Officer Olson and the prosecutor asked "[s]o [Officer Olson]'s just completely imagined this?" RP (10/8/14) 72-73. There was no objection and when defendant did not answer the question, the prosecutor asked "I've asked you a question which is very simply, is it your testimony that Officer Cody Olson imagined or fabricated his observations?" RP (10/8/14) 73. Defense counsel objected as argumentative saying that the prosecutor was putting words in defendant's mouth and the court sustained the objection. RP (10/8/14) 73. The prosecutor then asked "[s]o is it your

testimony that nothing even resembling a staring, looking even a glancing by you directed at Officer Olson occurred, do I have that right?" RP (10/8/14) 73.

While the prosecutor's initial questions asking whether defendant "imagined" or "fabricated" his testimony was likely improper, defendant is unable to show he was prejudiced by the questions as the trial court sustained an objection to the questions. *See* ***State v. Whitney***, 78 Wn. App. 506, 516, 897 P.2d 374 (1995) (no prejudicial or reversible misconduct where the trial court sustained objection to allegedly improper question). After the improper question was sustained, the prosecutor asked a more appropriately phrased question. That question directed the jury to the proper point she was attempting to make that defendant was denying that anything Officer Olson testified to had occurred.

Defendant is unable to show it is substantially likely that this question affected the verdict given the amount of other evidence which called into question his credibility. His testimony was in direct conflict with Ms. Matsubayashi when he denied making any threat to her and Sergeant Briner when he denied saying he would continue to threaten staff. RP (10/7/14) 122-24; RP (10/8/14) 48, 68-69, 86-87. The log entries reflected previous documented incidents between Officer Olson and defendant. RP (10/8/14) 45-46. Finally, the jury was aware defendant was incarcerated in the jail and in the 3 South unit with other high risk offenders because of behavioral issues. RP (10/7/14) 78. Defendant is

unable to show that he was prejudiced by the improper question as it is unlikely it affected the verdict.

b. The prosecutor did not shift the burden in her closing argument when she attacked the strength of the defense counsel's argument.

A prosecutor commits misconduct by arguing that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. ***State v. Fleming***, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (*citing* ***State v. Casteneda-Perez***, 61 Wn. App. 354, 362-62, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991)). Prosecutors may not give a personal opinion on the credibility of witnesses during closing argument, but they may argue inferences from the evidence. ***State v. Copeland***, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996). That includes inferences as to why the jury should believe one witness over another, including the defendant. *Id.* at 290-91.

Defendant contends that the prosecutor committed misconduct during the rebuttal portion of her closing argument when she argued:

> I'm not going to tell you what I think of my witnesses because I'm not allowed to. You get to decide. If these people got up here and are so vested in the outcome of this case that they are willing to, [defense counsel] says, I think, exaggerate, it is not exaggerate it's a lie, are all four of them manufacturing their testimony, all of them? How on earth – how did you explain that? How do you explain Sergeant Briener. He wrote a police report with the defendant's statements. That's a question I would like to know why would somebody do something like that.

RP (10/9/14) 52-53. Defense counsel did not object.

Made during the rebuttal portion of her closing, this argument by the prosecutor came in response to defense counsel's argument suggesting that all of the State's witnesses were exaggerating their testimony. During defense counsel's closing, she stated:

> So you've got to decide who is telling the truth. You can't base it on the fact that, hey, they work in the jail, they must be more honest than the guys who's incarcerated in the jail, because they aren't necessarily. They're also human beings who have needs and wants and sometimes exaggerate and sometimes make mistakes just like everyone else.

RP (10/9/15) 47-48. The prosecutor's argument was attacking the strength of the defense argument by pointing out how unlikely it would be for all four of the State's witnesses to have motivations to lie or exaggerate their testimony, especially when there was no evidence presented suggesting any of them had a reason to lie. That is an inference the prosecutor is allowed to argue and an inference the jury is allowed to draw and consider in evaluating the credibility of the witnesses. The prosecutor never shifted the burden or argued anything close to saying the jury can only acquit if they find the State's four witnesses are lying. The State's argument was proper and defendant fails to show the prosecutor committed flagrant and ill-intentioned misconduct.

c. The prosecutor did not shift the burden in her closing argument when she pointed out evidence which supported her case.

In closing arguments, prosecutors are given wide latitude to argue reasonable inferences from the evidence. ***State v. Dhaliwal***, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). It is misconduct for a prosecutor to argue that the burden of proof rests with the defendant and a prosecutor generally cannot comment on the defendant's failure to present evidence as the defendant has no duty to present evidence. ***State v. Thorgerson***, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, a prosecutor can argue that the evidence does not support the defense theory; a prosecutor is entitled to make a fair response to defense arguments. ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). A prosecutor is entitled to point out a lack of evidentiary support for a defendant's theory of the case. ***State v. Killingsworth***, 166 Wn. App. 283, 291-92, 269 P.3d 1064 (2012). The mere mention that a defendant is lacking evidence does not constitute prosecutorial misconduct or shift the burden of proof to the defense. ***State v. Jackson***, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

Defendant argues that the State improperly shifted the burden to the defendant by suggesting that defendant had an obligation to disprove the State's evidence. He points to two instances, neither of which were objected to by defense counsel. In the first instance, the prosecutor was

discussing the credibility of Ms. Matsubayashi's identification of the defendant's voice as the individual who threatened her. Because Ms. Matsubayashi did not actually see defendant make the threat, the perpetrator's identity was at issue in the trial. The prosecutor said:

> There is nothing that would indicate, reasonably, that Ms. Matsubayashi was inaccurate in her identification of the defendant's comments on June 30th, bo[th] by the identification of his voice, but also the same content of material or information that he had directed toward her leading up to that date.

RP (10/9/15) 21. The prosecutor was not arguing that defendant was required to provide some evidence to show that Ms. Matsubayashi's identification was incorrect. To the contrary, the second half of the prosecutor's comments show that she was arguing that the evidence that was presented supports her argument that Ms. Matsubayashi's identification of defendant as the perpetrator was credible. The prosecutor argued that Ms. Matsubayashi's testimony that she was sure it was the defendant's voice and the evidence that Ms. Matsubayashi had observed and heard the defendant make escalating inappropriate comments to her on previous occasions, were both pieces of evidence which supported and made Ms. Matsubayashi's identification of the defendant as the person who threatened her on the 30th more credible.

The second instance defendant points to occurred when the State argued:

> We also have the independent evidence that there was pepper spray. The defendant admits that he was pepper sprayed, but said it was for absolutely no reason. He received bedding change and clothing change and also received medical attention. Now, mind you, if you have been pepper sprayed by an officer for no reason, would you not make a comment to the medical staff? Would you not seek to make a complaint to the internal affairs or to your lawyer or to anybody that you were essentially being abuse[d] in jail by a particular officer. None of that occurred. None of that occurred. Sergeant Miller testified that the defendant required new clothing and medical attention, as I've indicated. The defendant has not denied that he was pepper sprayed and there was no evidence that defendant ever sought to make a complaint regarding behavior.

RP (10/9/14) 35-36. Defendant himself admitted that he never complained about the officer's behavior to anyone. RP (10/8/14) 74-75. The prosecutor was not arguing or implying that the defendant had failed to provide evidence to support that claim, she was arguing what the evidence actually showed. The prosecutor was attacking the credibility of the defendant's theory of the case by pointing out that normally if a person was pepper sprayed for no reason, they would report that to someone. The evidence that defendant did not report it to anyone, including his own admission of that, made his story less credible, as his behavior was not consistent with what a reasonable person would do in that situation.

In neither of the statements above did the prosecutor argue that the defendant had an obligation to disprove the State's evidence. In both cases, the prosecutor was arguing inferences from the evidence that was

presented. Furthermore, nowhere in the State's closing does the prosecutor argue that the defendant should have called a witness in his case to disprove something, so the defendant's argument concerning the missing witness rule is not an issue. The prosecutor did not shift the burden of proof in her closing and defendant has failed to show she committed flagrant and ill-intentioned misconduct.

d. The prosecutor did not argue facts that were not in evidence when she drew inferences from the officers' actions in handling the incidents involving the defendant.

A prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence, but it is improper to argue facts not in evidence. ***State v. Boehning***, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). During her closing argument, the State referenced the "extra work" that the State's witnesses had to do in dealing with the defendant's behavioral issues in the jail. RP (10/9/15) 31. Defendant did not object to those comments. In his opening brief, defendant takes select portions of the State's argument and claims that the State argued facts not in evidence because there was no evidence to suggest that any of the witnesses took on extra work. Appellant's Opening Brief at 18-19.

However, the entirety of the State's argument makes clear she was not arguing that the witnesses took on "extra", meaning additional, work on top of their usual job duties. Rather, she was arguing that it does not make sense that all the officers would have done the additional work of

"documenting, reporting, relaying, forwarding and testifying for no good reason." RP (10/9/15) 31. Essentially, if the defendant's claim that he never engaged in the majority of the incidents the officers testified about is true, then the officers' actions of creating and moving all the paperwork involved a significant amount of unnecessary work. She then drew the inference that they would not have done that unnecessary work for no good reason. The prosecutor's argument discussing the extra work by the officers was not misconduct as it was supported by the evidence. Defendant fails to show the prosecutor's argument was flagrant and ill-intentioned misconduct.

e. The prosecutor did not commit misconduct in her argument about the credibility of witnesses by asking the jury to draw reasonable inferences from the evidence.

Although it is improper to vouch for a witness' credibility, attorneys may argue credibility and draw inferences from the evidence. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). " '[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.' " ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (emphasis omitted) (*quoting* ***State v. Armstrong***, 37 Wn. 51, 54-55, 79 P. 490 (1905)). A prosecutor arguing credibility only commits misconduct when it is clear that they are expressing a personal opinion rather than arguing an

inference from the evidence. ***State v. Copeland***, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996)(*citing* ***State v. Swan***, 114 Wn.2d 613, 664, 790 P.2d 610 (1990)). For example, "I believe [the witness]. I believe him." is improper. ***State v. Brett***, 126 Wn.2d at 175 (*quoting* ***State v. Sargent***, 40 Wn. App. 340, 343, 698 P.2d 598 (1985)).

In the present case, defendant argues that the prosecutor committed misconduct when she argued in closing argument:

> The ability of a witness to observe accurately. In this case, there is no evidence at all that anything, particularly as it relates to Officer Olson was obstructed, interfered with, etcetera. I believe I've already addressed any sound issues that may pertain to the second count involving Azusa Matsubayashi. The State submits both of them were in the best position to hear and to observe and to testify, that they credibly gave you explanations as to why they could hear when they could hear.
>
> One of the things I would point to, a teacher I had used to call them polygraph keys. And what they were, not like the polygraph machine, but there is a ring of truth that happens when certain things are said that make you kind of realize, you know what, this makes sense. Only somebody who was truly in this circumstance would think to say that or would think to include it.
>
> As it relates to Officer Olson, I would say his comment that he never looked up the inmates who he is supervising. A lot of other officers do. They want to know who do I have in here. He specifically said he does not do that because it ensures he treats them all the same. I wold [sic] submit that to you as kind of an insight as to how he does his business and how he works his job. And that he is not the type of officer who goes and looks for inmates to focus on them. I also submit his demeanor does not strike me as a person who is particularly anxious to have confrontations that are

> particularly aggressive or of that nature. You get to decide his demeanor from what you saw.
>
> As it relates to Azusa, the little polygraph key that I heard is when on June 30th she was working on her tier and she thought she heard somebody threatening her, but she wasn't sure. So she paused and waited to see if she heard anything else, and she did. And that was when she was sure that she was hearing the defendant directing threats at her. If somebody who is mis-recalling, making something up is not going to add or think to add the fact that they paused and waited. They would just say, I heard it clear every time, I heard every word. She paused because she's a thorough person, she wants to be accurate. I submit that's a fact you can consider in terms of determining the accuracy and credibility of her testimony.

RP (10/9/14) 26-28. At no point did the defense attorney object to any of this argument. On appeal, the defendant first claims that the prosecutor expressed a personal opinion about the credibility of the two witnesses when she said "[t]he State submits both of them were in the best position to hear and to observe and to testify, that they credibly gave you explanations as to why they could hear when they could hear." RP (10/9/15) 26.

However, the preceding statements make clear that the prosecutor was discussing the jury's ability to take into consideration the ability of the witness to observe the evidence in evaluating their credibility. Throughout the testimony of Officer Olson and Ms. Matsubayashi, the veracity and accuracy of their ability to hear the defendant make the threats was questioned. There was testimony about the ability to hear in

the cells when doors were shut and there were noises coming from other inmates. RP (10/7/14) 104, 108-109; RP (10/8/14) 24-27, 32-33. In making the concluding statement that defendant argues was improper, the prosecutor was merely arguing that based on Officer Olson and Ms. Matsubayashi's testimony and their logical explanations about the incidents, the jury should find the two witnesses credible. The prosecutor was not expressing a personal opinion, she was arguing inferences from the evidence and testimony that was presented.

The defendant also claims the prosecutor committed misconduct by discussing the "polygraph keys" or details that have "a ring of truth" because that likewise expressed a personal opinion on the credibility of witnesses. However, the prosecutor here pointed out specific pieces of evidence in the testimony of Officer Olson and Ms. Matsubayashi from which the jury could reasonably infer their testimonies to be credible. She discussed how the jury could infer that Officer Olson's decision about not looking up the inmates to see what they were in custody for was a reflection of the way he conducted his job. This was in response to defendant's theory that Officer Olson personally sought out the defendant and falsified all the incident reports that occurred between them. The prosecutor was arguing to the jury that they could infer that based on Officer Olson's demeanor and discussion about how he performs his job, that defendant's characterization of him was not credible.

The prosecutor also argued that Ms. Matsubayashi's testimony that she stopped and waited to clearly hear what the person threatened her had said was evidence which made her testimony about what happened much more credible. The prosecutor argued that a person who was falsifying the event would have been more likely to claim they heard every word clearly. She argued that from that, the jury could infer that the detail of admitting to stopping and listening more closely made Ms. Matsubayashi's testimony credible.

These two arguments are similar to what the Supreme Court has already held to be a proper argument. In ***State v. Warren***, the Court held that the prosecutor's argument that specific details in the victim's testimony gave it a "badge of truth" and a "ring of truth" was not improper as it discussed the credibility of the witness by drawing reasonable inferences from the evidence produced at trial. ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, --- U.S. ---, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Like in ***Warren***, the prosecutor in the present case was not expressing a personal opinion, but arguing inferences about credibility based on the evidence that was produced at trial. The phrase "polygraph key" was used just as the phrase "badge of truth" or "ring of truth" was used in ***Warren***, to describe a certain key piece of evidence which suggests the witness is more credible. Defendant fails to show the prosecutor committed flagrant and ill-intentioned misconduct.

f. Even if the court were to find the prosecutor committed misconduct in any of the instances where defense counsel failed to object, defendant is still unable to show prejudice given the number of times the jury was reminded and instructed on the law.

Even if any of the prosecutor's statements could have somehow been construed as shifting the burden or commenting on the credibility of witnesses, defendant is unable to show any enduring prejudice. The jury was reminded numerous times that the State has the burden of proof in the case and that the jurors were the sole judges of the credibility of the witnesses. The defense attorney discussed how the burden of proof was on the State in her closing, and the prosecutor re-emphasized that point during her rebuttal. RP (10/9/14) 49, 54. Both counsel repeatedly stated that it was the jurors' responsibility to evaluate the credibility of the witnesses and the defendant. RP (10/9/14) 23-24, 28, 46-47, 51, 53. The jury instructions, which were both orally read to the jury and provided in written form, described how the burden of proof was on the State and it was the juror's responsibility to evaluate the credibility of the witnesses. RP (10/9/14) 8; CP 112-132, Instruction Nos. 1, 3. They also reminded the jury that the lawyers' statements were merely argument and the court's instructions contained the law they should follow. CP 112-132, Instruction No. 1.

Even with no objection, the jury was reminded numerous times both by the attorneys and the court that the State had the burden of proof

and the jurors themselves were the sole judges of the credibility of the witnesses. Thus, even if the prosecutor's arguments which were not objected to by defense counsel were to be considered misconduct, defendant is unable to show he suffered an enduring prejudice necessary for reversal.

2. DEFENDANT FAILS TO SHOW THE ADMISSION OF PRIOR BAD ACTS MATERIALLY AFFECTED THE OUTCOME OF HIS TRIAL AS MANY WERE PROPERLY ADMITTED AND ANY ERROR IN THE ADMISSIONS WERE HARMLESS.

Evidentiary rulings by the trial court are reviewed under an abuse of discretion standard. ***State v. Myers***, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997). An abuse of discretion occurs when the decision of the court is "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court's decision is manifestly unreasonable, if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." ***In re Marriage of Littlefield***, 133 Wn.2d 39, 44, 940 P.2d 1362 (1997).

a. Any error in the trial court's admission of defendant's prior convictions was harmless.

ER 609 governs impeachment by evidence that the witness or defendant has been convicted of a crime. Under ER 609(a)(1), the prior conviction is admissible if it "was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered." Prior to admitting the prior conviction under this prong however, the trial court must balance the following factors on the record to determine whether the probative value of the prior conviction outweighs its prejudicial effect: (1) the length of the defendant's criminal record; (2) the remoteness of the prior convictions; (3) the nature of the prior crimes; (4) the centrality of the credibility issue; and (5) the impeachment value of the prior crimes. ***State v. Calegar***, 133 Wn.2d 718, 722, 947 P.2d 235 (1997)(*citing* ***State v. Alexis***, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980)).

Under ER 609(a)(2), the prior conviction is admissible if it "involved dishonesty or false statement, regardless of the punishment." To determine whether a conviction is a crime of dishonesty, the trial court is limited to examining "the elements and date of the prior conviction, the type of crime, and the punishment imposed." ***State v. Newton***, 109 Wn.2d 69, 71, 743 P.2d 254 (1987). However, if the prior conviction is for burglary which is not a per se crime of dishonesty, the trial judge may

identify the crime the individual intended to commit inside the unlawfully entered building and look to the elements of that crime. ***State v. Schroeder***, 67 Wn. App. 110, 117, 834 P.2d 105 (1992). If the predicate crime was theft, a burglary conviction may be used as a crime of dishonesty under ER 609(a)(2). *Id.* at 115.

During motions in limine in the present case, the State sought to admit four of defendant's prior convictions under ER 609. They consisted of two felonies, a 2010 residential burglary and a second degree assault, and two misdemeanors, a 2009 fourth degree assault and a 2005 criminal trespass in the first degree. RP (10/7/14) 47-48. The trial court declined to admit the two gross misdemeanors as they were not crimes of dishonesty admissible under ER 609(a)(2), but stated it would admit the second degree assault conviction as it did not find it was more unfairly prejudicial than probative. RP (10/7/14) 51-53. The court initially declined to rule on the admissibility of the residential burglary conviction until the State determined what the underlying crime was saying "if it turns out it was with the intent to commitment [sic] assault therein or something like that, then we'll have to readdress it under different criteria than truth and dishonesty." RP (10/7/14) 52.

The issue was not brought up again until the following day during the cross examination of the defendant when the State asked the defendant whether he had been convicted of residential burglary. RP (10/8/14) 95. Defense counsel asked for a hearing outside the presence of the jury and

the court, and the parties realized that they had forgotten to revisit the issue regarding the admissibility of the residential burglary conviction. RP (10/8/14) 96-97. After determining the underlying crime in the residential burglary conviction was an assault, the prosecutor recognized the conviction would not be admissible as a crime of dishonesty under ER 609(a)(1) and sought to have it admitted under ER 609(a)(1). (10/8/14) RP 97-100. After hearing argument from both parties, the court ruled the residential burglary conviction was admissible as it was probative of defendant's credibility and that outweighed any prejudice. (10/8/14) RP 100-108.

The State resumed its cross of defendant and at the end said "I apologize, [I] think there was a question before we broke for lunch, I don't know that it got answered... you were going to acknowledge but is it not accurate you have been convicted of residential burglary?" RP (10/8/15) 112. Defendant answered "correct" and there were no further questions. *Id.* Evidence of defendant's prior assault in the second degree conviction was never admitted or discussed with the jury.

The trial court did not err in determining that the probative value of the defendant's residential burglary conviction outweighed any prejudice. Defendant had several other prior convictions, including an unlawful imprisonment in 2006 and felony harassment and felony protection order violation from 2004. RP (10/7/14) 47. The State sought to admit the residential burglary conviction because it was not a particularly

inflammatory or egregious crime, but was reflective of the defendant's criminal past. RP (10/8/14) 103-104. The conviction was from 2010, a relatively recent conviction in comparison to his other criminal history making it more relevant for that reason as well. Finally, the prejudicial effect of the jury hearing of a conviction in this case was diminished given the fact that the jury was already aware defendant was incarcerated for some reason. The trial court did not abuse its discretion in determining that the probative value of the conviction outweighed any prejudice.

The failure of the trial court to consider the applicable factors in determining whether evidence of a prior conviction is admissible for purposes of impeachment is not reversible error unless defendant can show that had the error not occurred, the outcome of the trial would have been materially affected. ***State v. Gomez***, 75 Wn. App. 648, 657, 880 P.2d 65 (1994). While it does not appear the trial court engaged in a full analysis on the record of the factors required for admissibility of the residential burglary conviction under ER 609(a)(1), defendant is unable to show error as he is unable to show that had the prior conviction not been admitted, the outcome of the trial would have been materially affected.

The court's instructions to the jury detailed that the jury was only to consider the evidence of defendant's prior conviction in deciding what weight or credibility to give to the defendant's testimony and for no other purpose. CP 112-132 (Instruction No. 7). There was also overwhelming evidence that suggested to the jury that the defendant had been convicted

of some crime. The two incidents defendant was on trial for took place inside of the Pierce County Jail. As a result, the jury heard extensive testimony describing jail procedures and the physical layout of the jail. All of the State's witnesses were jail employees, and three were corrections officers. All this suggested to the jury that defendant had some type of criminal history in his past and thus, learning that he had a previous conviction for residential burglary would not have had a material effect on their decision.

The fact that the conviction was for a felony as opposed to a misdemeanor or civil contempt violation would also have had no material effect on their decision given the lengthy testimony about how defendant was housed in 3 south with the highest security risk offenders for behavioral problems. RP (10/8/14) 62. Any error associated with the admission of defendant's prior residential burglary conviction was harmless given the court's instruction to the jury, the context of the alleged incidents having occurred in the jail and the other testimony surrounding the defendant's incarceration that was presented in this case.

On appeal, defendant also contends that the trial court erred in admitting the second degree assault conviction. However, no information regarding defendant's second degree assault conviction was ever presented to the jury. While the court ruled in motions in limine that the conviction would be admissible, the State never brought it up or sought to introduce any evidence of it. As a result, any error associated in the court's ruling

on its admission was harmless as it was never discussed in front of the jury.

b. The trial court did not improperly admit propensity evidence and even if it did, any error was harmless.

In general, evidence of a defendant's prior crimes, wrongs or acts are inadmissible to demonstrate the person's character or general propensities. However, such evidence may be admissible for other purposes such as proof of "motive, opportunity, intent preparation, plan, knowledge, identify or absence of mistake or accident." ER 404(b). To admit evidence of other wrongs under ER 404(b), the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

A party offering the evidence of prior misconduct has the burden of proving by a preponderance of evidence that the misconduct actually occurred. ***State v. Tharp***, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). A court's preliminary finding on the issue will be upheld if it is supported by substantial evidence. ***State v. Benn***, 120 Wn.2d 631, 653, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). An evidentiary hearing is permitted, but not required, and the trial court may

make its decision whether to admit the evidence "based simply on an offer of proof." ***State v. Kilgore***, 147 Wn.2d 288, 295, 53 P.3d 974 (2002). The decision whether to conduct a hearing is within the sound discretion of the trial court. *Id.*

After a court determines that the evidence of other acts is relevant, it must weigh the probative value of the evidence against its prejudicial effect. ***State v. Lough***, 125 Wn.2d 847, 862-63, 889 P.2d 487 (1995). Evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. ***State v. Boot***, 89 Wn. App. 780, 788, 950 P.2d 964 (1998) (*citing* ***State v. Saltarelli***, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). The weighing must appear on the record and is reviewed for an abuse of discretion. ***Lough***, 125 Wn.2d at 862-63.

i. Prior misconduct in the jail

Defendant alleges that the trial court erred in admitting defendant's repeated instances of misconduct in the jail. Appellant's Opening Brief at 25. During cross examination of the defendant, defendant denied that he had been disrespectful to staff at the jail, and the prosecutor attempted to impeach him by questioning him about times when he had been written up for his behavior. RP (10/8/14) 73-76. The State briefly questioned defendant about four dates where he was written up for his behavior and

then began discussing incidents involving Officer Olson. RP (10/8/14) 75-76. Shortly thereafter, defense counsel objected and indicated that she believed she may have misstepped by failing to object to the earlier incidents discussed which did not involve Officer Olson. RP (10/8/14) 79-83. The court limited the State's inquiry to those incidents involving Officer Olson and Ms. Matsubayashi, and stated it would consider a limiting instruction regarding any testimony involving incidents involving other staff. RP (10/8/14) 82-83.

Defendant argues on appeal that he was prejudiced by the admission of his repeated instances of misconduct, but the majority of what was discussed during his cross examination were incidents involving Officer Olson which were relevant and admissible. The State only very briefly mentioned four dates when defendant was written up for his behavior in an attempt to impeach defendant's statement that he had never been disrespectful towards staff. Defense counsel failed to object to those questions, and because they do not constitute a manifest constitutional error, RAP 2.5(a)(3) precludes review of the issue. *See* ***State v. Mendoza-Solorio***, 108 Wn. App. 823, 834, 33 P.3d 411 (2001).

Regardless, even if this Court were to consider the mention of those dates an error, it was harmless. The questions asked only about the dates and did not go into detail about the incidents. The trial court also gave a limiting instruction at the end which instructed the jury they were not to consider that evidence in deciding the two crimes against defendant.

CP 112-132, Instruction No. 8. This instruction essentially moved to strike the testimony from any consideration by the jury. Jurors are presumed to follow the court's instructions. ***State v. Johnson***, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). There is nothing in the record indicating they did not do that. As a result, if the court were to choose to review the issue and find the brief mention of the dates could have been an error, it was harmless as the jury was instructed not to consider it in reaching their verdict.

ii. Booking photo

Defendant also alleges that the trial court erred in admitting his booking photo during the trial. Appellant's Opening Brief at 25-27. A booking photograph is not necessarily prejudicial. ***State v. McCreven***, 170 Wn. App. 444, 485, 284 P.3d 793 (2012). Booking photos may be admissible at trial when identity is at issue, particularly when the defendant materially changes his appearance between his arrest and his trial. ***State v. Scott***, 93 Wn.2d 7, 13, 604 P.2d 943 (1980); ***State v. Rivers***, 129 Wn.2d 697, 710-11, 921 P.2d 495 (1996). Specifically, booking photos are material and relevant when they are the ones from which the witness makes the identification of the defendant. ***State v. Tate***, 74 Wn.2d 261, 267, 444 P.2d 150 (1968).

Midway through the trial, the State told the court it anticipated moving to admit the defendant's booking photo, and defense counsel

objected. RP (10/8/14) The State argued the photo was relevant and admissible because on the day of the threat, Ms. Matsubayashi heard only a voice and she recognized that voice as being the voice of the defendant's from a previous face to face interaction. Ms. Matsubayashi knew defendant's identity during that previous interaction because she would look up the names of the individuals she was supposed to meet with on the jail LINX system prior to meeting with them and had done so with the defendant. RP (10/8/14) 3-10. Defendant's appearance was also different during the trial and the photograph more closely resembled defendant's physical appearance during the time frame Ms. Matsubayashi met with him and the threats were made. RP (10/8/14) 3. The court agreed with the State and allowed the State to introduce the booking photo once the appropriate foundation had been laid. RP (10/8/14) 6-7, 10, 13-14.

The trial court did not abuse its discretion in admitting the booking photograph because it was used to connect defendant's identity to the voice that made the threat to Ms. Matsubayashi. She knew the voice because she had a prior meeting with the person who had that voice and she knew that person was the defendant because of the booking photograph. The fact that defendant did not dispute they had a prior meeting was irrelevant at that point in the trial because it was the State's burden to prove defendant was the person who made the threat.

Defendant's concession that they had previously met only came once he testified which at that point in the trial had not happened. The State could not rely on the presumption that the defendant would testify and admit that he had a meeting with Ms. Matsubayashi to prove its case.

Furthermore, as discussed elsewhere in the brief, the jury was well aware that defendant had been incarcerated at some point during this trial. *See* argument under 2(a). It would come as no surprise that he had a booking photo taken when he was arrested. The admission of defendant's booking photograph was relevant and certainly not unduly prejudicial given the circumstances of the case.

iii. Residential burglary conviction

Defendant also argues that the trial court improperly admitted his residential burglary conviction. Appellant's Opening Brief at 27-29. For the reasons previously stated in this brief, any error in the admission of that evidence was harmless. *See* argument under 2(a).

iv. Cumulative error[1]

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing

[1] The defendant's brief appears to make an argument that the cumulative effect of the erroneously admitted propensity evidence denied defendant the right to a fair trial. *See* Appellant's Opening Brief at 24-30. Although it is not specifically stated as such, the State is responding because it believes that is part of the argument.

court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for "there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have

been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See*, e.g., ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial,

there can be no accumulation of prejudice. *See*, e.g., ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see*, e.g., ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see*,

e.g., ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see*, e.g., ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

3. THE TRIAL COURT PROPERLY CALCULATED DEFENDANT'S OFFENDER SCORE.

a. Sufficient evidence was presented to prove defendant's 2006 prior conviction for unlawful imprisonment.

An appellate court reviews a sentencing court's calculation of an offender score de novo. ***State v. McCraw***, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). The State bears the burden of proving a defendant's prior criminal history for purposes of calculating the offender score by a preponderance of the evidence. RCW 9.94A.500(1); ***State v. Ammons***, 105 Wn.2d 175, 185-86, 713 P.2d 719 (1986), *cert denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L.Ed.2d 351 (1986). The best evidence of a prior conviction is a certified copy of the judgment of conviction, but the State may use any documents of record or transcripts of prior proceedings to establish the criminal history. ***State v. Mitchell***, 81 Wn. App. 387, 390, 914 P.2d 771 (1996) (*citing* ***State v. Descoteaux***, 94 Wn.2d 31, 36, 614 P.2d 179 (1980); ***State v. Herzog***, 48 Wn. App. 831, 834, 740 P.2d 380 (1987)).

A trial court may rely on defendant's stipulation or acknowledgment of prior convictions without further proof. ***State v. Roy***, 147 Wn. App. 309, 316, 195 P.3d 967 (2008). A "defendant's mere

failure to object to State assertions of criminal history at sentencing does not result in an acknowledgment," rather, "[t]here must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations." ***State v. Hunley***, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

During sentencing in the present case, the State relied upon five previous felony convictions to establish five of the points in defendant's offender score. Four of the convictions stemmed from a 2010 judgment and sentence under cause number 10-1-01979-2 and a certified copy of that judgment and sentence was presented to the court. CP 66-99; RP (11/18/14) 3-4. The fifth point calculated by the State stemmed from a 2006 unlawful imprisonment conviction. RP (11/18/14) 3-4. While it appears there was never a certified copy of the judgment and sentence for that conviction admitted, there was additional evidence presented to the court which establishes proof of the conviction by a preponderance of the evidence.

The criminal history presented in the certified copy of defendant's judgment and sentence under cause number 10-1-01979-2 showed the 2006 unlawful imprisonment conviction. CP 76. That conviction was relied upon in the 2010 case to establish one of the four points defendant agreed was his offender score. CP 91. The State also presented the court

with a prior record and offender score document for the present case which included a criminal history compilation reflecting the 2006 unlawful imprisonment conviction. CP 139-143. Defendant admitted that he had previously pleaded guilty to every other offense he had been charged with and this was his first trial. RP (11/18/14) 5-6. Defendant did not object to the State's proof of the prior convictions, but refused to stipulate to them. Specifically, counsel stated "I believe when there is a trial and she proves up the point, I don't believe there is a stipulation of criminal history. We certainly wouldn't sign it, but I don't think it needs or should be filed because she's already proven up those points." RP (11/18/14) 9.

It was after all this information was presented to the court that the court accepted the State's calculation of the defendant's offender score. Defendant's admission to the court to pleading guilty to all of his previous convictions served as an affirmative acknowledgment of his criminal history. Thus, while a certified copy of the judgment and sentence for the 2006 unlawful imprisonment conviction was never admitted, there was evidence in the record to support the trial court's finding proof of the conviction by a preponderance of the evidence.

However, should this Court disagree, the proper remedy is to remand and allow the State another opportunity to provide evidence to

prove defendant's prior criminal history by a preponderance of the evidence. RCW 9.94A.530(2); ***State v. Jones***, 182 Wn.2d 1, 10-11, 338 P.3d 278 (2014).

b. Defendant failed to preserve the issue of whether his four prior 2010 convictions constituted the same criminal conduct.

The defendant bears the burden of proving prior convictions encompass the same criminal conduct such that they are not counted separately when calculating an offender score under the SRA. ***State v. Williams***, 176 Wn. App. 138, 820, 307 P.3d 819, *affirmed*, 181 Wn.2d 795, 336 P.3d (2013). Whether prior convictions constitute the same criminal conduct under RCW 9.94A.525(5)(a)(i) for purposes of calculating the offender score of a defendant involves a factual dispute that requires the trial court to make a discretionary call. ***In re Shale***, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). A defendant's failure to raise and contest the issue before the sentencing court waives the right to appeal it. *Id.*; ***State v. Jackson***, 150 Wn. App. 877, 892, 209 P.3d 553 (2009); ***State v. Wilson***, 117 Wn. App. 1, 21, 75 P.3d 573 (2003).

In the present case, defendant alleges that the trial court abused its discretion in failing to address whether the prior convictions from 2010 constituted the same criminal conduct. However, defendant never objected to the court treating the four crimes as separate points or raised the issue that they might constitute the same criminal conduct during the

sentencing hearing. RP (11/18/14) 5-10. As a result, he waived the issue and this Court should decline to review it.

Furthermore, because defendant failed to raise the issue in the court below, there is insufficient information to determine whether the crimes did constitute the same criminal conduct. The 2010 convictions consisted of residential burglary, second degree assault, felony violation of a protection order and felony harassment. CP 144-156. While the 2010 declaration of probable cause describing a factual summary of the crimes was provided to the court, there are significant questions about specific details which would impact a same criminal conduct argument. For example, the timing of the incidents, who the victims were alleged to be in each of the crimes, and the specific actions of the defendant are all unknown from the evidence that was before the court. More information would be necessary to investigate the incident further in order to make a determination about whether the crimes constituted the same criminal conduct. Because defendant failed to raise the issue below, he failed to properly preserve the issue for review and the record is inadequate to make any determination about the crimes constituting the same criminal conduct.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT HE WAS PREJUDICED BY ANY DEFICIENCY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d

185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective

assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

a. Defendant fails to show counsel was ineffective for failing to object to the admission of specific evidence.

To establish that counsel's failure to object to evidence constituted ineffective assistance, a defendant must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel had actually made it, and (3) the

result of the trial would have differed if the trial court excluded the evidence. ***State v. Sexsmith***, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). The Washington Supreme Court has explained:

> An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. Collateral matters, which may appear in retrospect to have been errors in judgment or in trial strategy, cannot be said to constitute incompetence. The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial [?]

State v. Lei, 59 Wn.2d 1, 6, 365 P.2d 609 (1961) (internal citations omitted).

i. 2010 residential burglary conviction.

During motions in limine, the State moved to admit four of defendant's prior convictions under ER 609. They consisted of two felonies, a 2010 residential burglary and second degree assault, and two misdemeanors, a 2009 fourth degree assault and a 2005 criminal trespass in the first degree. RP (10/7/14) 47-48. Defense counsel objected to the admission of the two misdemeanors as they did not fall under either prong of ER 609(a) and the assault in the second degree arguing it was more prejudicial than probative. RP (10/7/14) 49. The court and the prosecutor then engaged in a discussion about what the underlying felony was that formed the basis for the residential burglary conviction, suggesting that if

it was done with intent to commit a theft, it would be admissible under ER 609(a)(2). RP (10/7/14) 51-52[2]. The court ultimately set over ruling on the admission of the residential burglary conviction to allow the State an opportunity to determine what the underlying conviction was. RP (10/7/14) 52.

The issue was not brought up again until the following day during the cross examination of the defendant when the State asked the defendant whether he had been convicted of residential burglary. RP (10/8/14) 95. Defense counsel asked for a hearing outside the presence of the jury and the court and the parties realized that they had forgotten to revisit the issue regarding the admissibility of the residential burglary conviction. RP (10/8/14) 96-97. After determining the underlying crime in the residential burglary conviction was an assault, the prosecutor recognized the conviction would not be admissible as a crime of dishonesty under ER 609(a)(1) and sought to have it admitted under ER 609(a)(1). (10/8/14) RP 97-100. After hearing argument from both parties, the court ruled the residential burglary conviction was admissible as it was probative of defendant's credibility and that outweighed any prejudice. (10/8/14) RP 100-108.

---

[2] In the initial part of the conversation the court states "Now, as to the Assault 2, can you satisfy the requirement that the entry was done with the intent to commit a theft?" While the court states "Assault 2", it is clear from the context of the question and the remaining conversation that he is actually referring to the residential burglary conviction.

After reviewing the record of the present case, it is apparent that the defense counsel's failure to object to the residential burglary conviction was not deficient performance on her part. During motions in limine, neither party, nor the court was aware of what the underlying felony was for the residential burglary conviction. Because of the lack of information, any argument or objection about its admission was irrelevant until the parties were aware of what the underlying felony was and what prong of 609(a) the State was seeking to admit the conviction under. As soon as evidence of the conviction came out in direct, defense counsel immediately requested a hearing outside the presence of the jury and moved for a mistrial. Because there had been no further discussion about the admission of the residential burglary conviction prior to that, defense counsel had no expectation at that point that any information about it would be brought out. Once it inadvertently happened however, she took appropriate action in moving for a mistrial outside the presence of the jury. Thus, defense counsel did not fail to object to something she was under the impression had not been fully addressed yet. Defense counsel was not deficient for failing to object to the admission of the 2010 residential burglary given that the circumstances reveal no actual fully developed argument about its admission took place.

ii. Prior misconduct at the jail.

During motions in limine, defense counsel moved to exclude prior bad acts of the defendant which involved statements to Ms. Matsubayashi

and interactions with Officer Olson under ER 404(b). RP (10/7/14) 53-54, 66-67. The State argued they were admissible to show the reasonableness of the fear of the victims and after hearing argument from both parties, the trial court admitted them. RP (10/7/14) 53-69.

During cross examination of the defendant, the State began by asking whether defendant was aware of sanctions when inmate violates regulations in the jail. RP (10/7/14) 70. Defense counsel objected to beyond the scope of direct and the court overruled the objection. RP (10/7/14) 70. When defendant denied that he had been disrespectful to staff at the jail, the prosecutor attempted to impeach him by questioning him about times where he had been written up for his behavior. RP (10/8/14) 73-76. The State very briefly questioned defendant about four dates where he was written up for his behavior and then began discussing incidents involving Officer Olson. RP (10/8/14) 75-76. Shortly thereafter, defense counsel objected and indicated that she believed she may have misstepped by failing to object to the earlier incidents discussed which did not involve Officer Olson. RP (10/8/14) 79-83. The court limited the State's inquiry to those incidents involving Officer Olson and Ms. Matsubayashi and stated it would consider a limiting instruction regarding any testimony involving incidents involving other staff. RP (10/8/14) 82-83.

Defendant argues defense counsel was ineffective for failing to properly object during cross examination of defendant to the prior

incidents of misconduct in the jail which were elicited by the State. Appellant's Opening Brief at 33. During the initial inquiry, defense counsel objected to beyond the scope of direct, and defendant argues she should have objected under ER 402, ER 403 and ER 404(b). However, that inquiry appears to be the introductory question to asking defendant about his previous interactions with Officer Olson and Ms. Matsubayashi. The trial court had already ruled they were admissible under ER 404(b) and thus, defense counsel would not object on that basis as she had previously already attempted to do so. The objection to beyond the scope of direct was an attempt to curtail the line of questioning to the specific incidents the trial court had already previously ruled admissible. Defense counsel was not ineffective for making such an objection.

Defendant also argues defense counsel was ineffective when she "misstepped" and failed to object to prior incidents of misconduct. However, the majority of the questions by the State focused on the conduct of defendant during his interactions with Officer Olson and Ms. Matsubayashi which the trial court had previously ruled admissible during motions in limine. *See* RP (10/8/14) 71-74, 77-79. Defense counsel had already voiced her objection to those incidents and been overruled. The only incidents which were unrelated were four dates in defendant's inmate behavior log where he was reported to be uncooperative and sanctioned for those violations. RP (10/8/14) 74-77.

Defense counsel did not immediately object to those questions when asked and that may have been a result of initially believing they were further incidents involving Officer Olson. Regardless, once she recognized they were not, she objected again and alerted the court during the hearing outside the presence of the jury to that. While her delayed objection may have led to the admission of dates where defendant was considered uncooperative in the jail, this does not make the entire performance of defense counsel deficient. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. at 684-685. Nor is defendant able to prove that the trial court would have sustained such an objection at the time it was made given that it is reasonable that the court may have believed the incident to be related to Officer Olson or Ms. Matsubayashi as well.

Finally, a limiting instruction was presented to the jury which made any error in the admission of those specific dates harmless. *See* argument above under 2(b)(i) entitled "prior misconduct at the jail." As a result, defendant is unable to show the result of trial would have been different had that evidence been excluded.

iii. Officer Olson's statement that defendant was housed in the unit for the "worst offenders".

Defendant argues that defense counsel should have objected to Officer Olson's statement that defendant was housed in the unit for the

"worst offenders" because it was not relevant and even if it was, it was more prejudicial than probative. Appellant's Opening Brief at 35. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Officer Olson used the phrase "worst offenders" in the context of describing the layout of the 3 South Unit and explaining the classification of the inmates housed there. RP (10/7/14) 77-78. Defendant was claiming that he was not the individual who made the threats to Officer Olson and to Ms. Matsubayashi and that it was someone else housed on his unit who did. Telling the jury that 3 South was where the jail kept their "worst offenders" was relevant to explain to the jury the reason certain protocols are used in dealing with the inmates and to explain the particular physical details of the cells. All of that information went to explain the actions Officer Olson and Ms. Matsubayashi took in their interactions with defendant on those days. The statement was certainly relevant and not prejudicial when the jury was well aware defendant was incarcerated as argued elsewhere in this brief. Defendant is unable to show that an objection to Officer Olson's statement would have been sustained.

Furthermore, defense counsel may have chosen not to object to not draw attention to the statement or because it actually furthered defendant's

theory of the case. A legitimate trial tactic may include choosing not to object so as not to risk emphasizing the testimony with an objection. ***In re Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Likewise, if defendant is housed in the jail with the "worst offenders", it makes it more likely that one of the other inmates could have threatened Officer Olson and Ms. Matsubayashi. Defendant is unable to show defense counsel was deficient for failing to object to Officer Olson's statement when it could have been a strategic decision.

b. Defendant cannot show defense counsel was deficient for failing to request a limiting instruction about defendant's previous interactions with Officer Olson and Ms. Matsubayashi.

The failure to request a limiting instruction does not render defense counsel's performance deficient. ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993). Several cases have held that the "failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." ***State v. Yarbrough***, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009) (*citing* ***State v. Price***, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005) ("[w]e can presume that counsel did not request a limiting instruction" for ER 404(b) evidence to avoid reemphasizing damaging

evidence); ***State v. Barragan***, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993)).

Defendant argues defense counsel was deficient for failing to request a limiting instruction about defendant's interactions with Officer Olson and Ms. Matsubayashi. Appellant's Opening Brief at 36. Defendant did request and receive a limiting instruction about the prior instances of misconduct in the jail which did not involve his interactions with Officer Olson and Ms. Matsubayashi. However, the decision not to request a limiting instruction regarding the incidents involving defendants interactions with Officer Olson and Ms. Matsubayashi could have been an effort to not draw any further attention to those incidents. Specifically, when the defendant's theory was that someone else had made the threats, he would not want to draw further attention to the previous interactions he had had with those two individuals. Defendant is unable to show defense counsel is deficient for failing to request a limiting instruction when the decision could have been strategic.

c. Defense counsel's performance was not deficient for not objecting to the prosecutor's arguments during closing which were not improper.

Defendant argues defense counsel was ineffective for failing to object to numerous instances of alleged prosecutorial misconduct in closing.[3] Appellant's Opening Brief at 37-39. However, as described above, defendant has failed to show the prosecutor's arguments were improper. *See* arguments above under 1(b)-(e). As a result, because the arguments were not improper, defendant cannot show his counsel's performance was deficient for failing to object. *See* ***State v. Larios-Lopez***, 156 Wn. App. 257, 262, 233 P.3d 899 (2010) (because the prosecutor's arguments were not improper, defendant is unable to show his counsel's performance was deficient in failing to object to them).

d. Defense counsel's performance was not deficient during the calculation of defendant's offender score.

Defendant argues that his counsel was deficient for failing to object to the inclusion of the 2006 unlawful imprisonment conviction in his offender score and by failing to argue that the 2010 crimes compromised

[3] Defendant argues counsel was ineffective for failing to object to the question of whether Officer Olson had "completely imagined" his interaction with the defendant. Appellant's Opening Brief at 38. The question was not answered and when it was asked again, defense counsel objected. Because defense counsel objected and the trial court sustained the objection, defense counsel's performance was not deficient and cannot be considered ineffective. *See* argument above under 1(a).

the same criminal conduct. Appellant's Opening Brief at 42. While a review of the record reveals a certified copy of the judgment and sentence for the 2006 unlawful imprisonment conviction was never presented to the court, there was sufficient evidence in the documents that were presented to support the trial court's finding of the conviction by a preponderance of the evidence. *See* argument above under 3(a). Defense counsel's failure to object was not deficient when there was no error.

Likewise, there may have been strategic reasons for defense counsel to elect not to argue that the 2010 convictions constituted the same criminal conduct. The trial court was about to sentence defendant on two convictions for felony harassment and the 2010 convictions compromised four convictions for residential burglary, second degree assault, felony violation of a protection order and felony harassment. CP 144-156. Defense counsel was arguing for the low end of the standard range in the present case while the State asked for the high end. RP (11/8/14) 4-5. Defense counsel may have been aware of facts from the 2010 convictions that she did not want the judge to become aware of or be thinking about when sentencing defendant to two more counts of felony harassment. She may have strategically chosen not to engage in a factual inquiry about defendant's past convictions which included another crime of felony harassment so as not to draw attention to those incidents and persuade the

court to impose the low end of the standard range. Defendant is unable to show defense counsel's performance was deficient in the calculation of his offender score.

e. Overview of defense counsel's performance.

A review of the entire record of defense counsel's performance in the present case shows defendant received effective assistance of counsel as guaranteed by the Sixth Amendment. Defense counsel routinely sought to exclude evidence on defendant's behalf throughout the trial. At the beginning of the trial, she requested a CrR 3.5 hearing, moved to exclude evidence of previous misconduct under ER 404(b), and argued several of his prior convictions did not fall under ER 609. RP (10/6/14) 3-29; RP (10/7/14) 47-73. During the trial, she cross examined the State's primary witnesses, attempting to call into question their credibility and the validity of their testimony. RP (10/7/14) 103-111; RP (10/8/14) 19-31, 40-41. Defense counsel sought to exclude the admission of defendant's booking photo and requested a mistrial when the prior conviction was inadvertently discussed during the cross of defendant. RP (10/8/14) 3-13. After defendant's conviction, defense counsel argued for the low end of the standard range against the State's request for the high end and the court imposed the mid-point. RP (11/18/14) 5-7. The overall performance of

defense counsel in the present case was not deficient. Defendant fails to satisfy the first prong of ***Strickland.***

5. THE "REASONABLE DOUBT" INSTRUCTION GIVEN TO THE JURY PROPERLY INFORMED THEM THAT THE STATE HAD THE BURDEN OF PROOF.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." ***State v. Pirtle***, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). An instruction that relieves the state of its burden constitutes reversible error. *Id.* An appellate court reviews this type of challenged de novo "in the context of the instructions as a whole." *Id.*

The trial court in the present case gave the following pattern instruction outlined in WPIC 4.01 to the jury as required by the Supreme Court in ***State v. Bennett***, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007):

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mid of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 112-132 (Instruction No. 3). Defense counsel did not object to any portion of the instruction[4]. RP (10/8/14) 118.

[4] The failure to object generally precludes appellate review except in where the claimed error is "a manifest error affecting a constitutional right." RAP 2.5(a)(3). Instructions that misstate reasonable doubt or shift the burden of proof to the defendant are constitutional errors. ***State v. McCullom***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

a. The phrase "in the truth of the charge" in WPIC 4.01 does not improperly shift the burden of proof to defendant.

Defendant in the present case alleges that the phrase "in the truth of the charge" confused the jury by improperly shifting the burden of proof and encouraging the jury to undertake a search for the truth. Appellant's Opening Brief at 44-45. To support his claim, defendant relies upon ***State v. Emery***, a case where the Supreme Court held that it is misconduct for a prosecutor to tell the jury that its job is to "speak the truth." 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

But, problems with "search for the truth" instructions arise only when the instructions misdirect or redirect the jury's focus. ***Victor v. Nebraska***, 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The Washington Supreme Court has expressly approved of the use of this instruction, and the Court of Appeals has specifically rejected this argument that the language impermissibly suggests that the jury's job is to search for the truth. ***Bennett***, 161 Wn.2d at 318; ***State v. Kinzle***, 181 Wn. App. 774, 784, 326 P.3d 370 (2014); ***State v. Fedorov***, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014). Those courts have held that the language merely elaborates on what it means to be "satisfied beyond a reasonable doubt." ***Kinzle***, 181 Wn. App. at 784. As a result, defendant is unable to

show that the instruction is constitutionally deficient for including the language "in the truth of the charge".

b. The phrase "a reason exists" in WPIC 4.01 does not improperly shift the burden of proof to defendant.

Defendant also alleges that the jury was improperly instructed because the use of an "a" before the term "reason" in the phrase "a reasonable doubt is one for which a reason exists" encouraged the jury to believe they needed a specific, articulable reason to doubt in order to acquit which improperly shifted the burden of proof to defendant. Appellant's Opening Brief at 46-49. However, nothing in the language of that phrase requires jurors to articulate a reason. When read in context, the phrase "a doubt for which a reason exists":

> Does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary. A phrase in this context has been declared satisfactory in this jurisdiction for over 70 years.

State v. Thompson, 13 Wn. App. 1, 5, 533 P.2d 394 (1975). *See also* ***State v. Emery***, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012) (prosecutor's argument properly described "reasonable doubt as a 'doubt for which a reason exists' "); ***State v. Bennett***, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); ***State v. Tanzymore***, 54 Wn.2d 290, 291 n. 2, 340 P.2d 178 (1959).

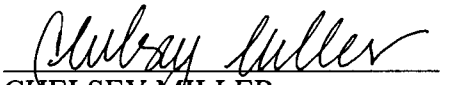
Furthermore, the Washington Supreme Court recently reached a similar conclusion in ***State v. Kalebaugh***, 183 Wn.2d 578, 355 P.3d 253 (2015). There, the Court held that a trial court misstated the law when it orally instructed the jury that a reasonable doubt "is a doubt for which a reason can be given," and that it should have read them "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists." ***Kalebaugh***, 183 Wn.2d at 584, 355 P.3d 253. The Court's opinion makes clear that while the trial court's oral remarks verged on an articulation requirement, the language in WPIC 4.01 does not. *Id.* at 584-86. Defendant is unable to show that the instruction is constitutionally deficient for including the language "in the truth of the charge".

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

DATED: November 24, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.23.16 _____
Date Signature

PIERCE COUNTY PROSECUTOR

November 24, 2015 - 2:23 PM

Transmittal Letter

Document Uploaded: 5-469120-Respondent's Brief.pdf

Case Name: State v. Cloud
Court of Appeals Case Number: 46912-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com